Paul Mueller Company *and* Sheet Metal Workers International Association, Local No. 208. Case 17–CA–17623–(M)

December 14, 2000

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On September 25, 2000, a three-member panel of the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding, reported at 332 NLRB No. 29. The Board, inter alia, granted the Respondent's motion to reopen the record to permit presentation of an evidentiary defense of its delay in reinstating 89 former unfair labor practice strikers. The Respondent made this motion, with which the General Counsel subsequently agreed, as an alternative to its exception seeking reversal of the judge's finding that the delay was unlawful. In support of the exception, the Respondent contended that representations by the General Counsel about the scope of the complaint procedurally barred the judge from addressing the issue of delayed reinstatement.

Based on the General Counsel's agreement to reopen the record, and without expressing any view of the merits of the Respondent's procedural argument in support of exceptions, the Board severed the delayed reinstatement issue and remanded it to the judge for further appropriate action. Thereafter, on November 14, 2000, the Respondent filed a withdrawal of its previously filed motion to reopen the record. The General Counsel and the Charging Party Union filed motions in opposition to the withdrawal.

The Board, having further considered the matter, has determined to permit the Respondent's withdrawal of its previously granted motion to reopen. We shall therefore rescind our prior Order remanding the delayed reinstatement issue to the judge. Contrary to the assumption underlying the Respondent's withdrawal of motion to reopen, the Board has not yet ruled on the procedural defense asserted in its exception to the judge's finding that the delayed reinstatements were unlawful. Upon review of the relevant evidence of the parties' understanding of the scope of the complaint allegations regarding the reinstatement of unfair labor practice strikers, we now find merit in that exception.

Paragraph 12(d) of the amended complaint in this proceeding alleged that "[s]ince about May 22, 1996, Respondent has failed and refused to return unfair labor practice strikers . . . or, in the alternative, return economic strikers to their former positions of employment including job positions, departments, and shifts." It is undisputed that the Respondent did not immediately reinstate 89 of the unfair labor practice strikers who offered to return to work on May 22. Based on this fact, the judge found that the Respondent's delay violated the Act.

On its face, paragraph 12(d) of the complaint is sufficiently broad to permit litigation of whether the Respondent unlawfully refused to return unfair labor practice strikers to work by delaying their reinstatement. In preliminary discussion at the hearing before the judge, however, counsel for the Respondent sought to clarify the scope of the allegation in paragraph 12(d) "to make it clear that there is no allegation that any striker has been refused reemployment, and *that the only allegations concerning [sic] the position, department and/or shifts to which the strikers have been returned*." (Emphasis added.) In direct response, counsel for the General Counsel stated, "That's right, Your Honor. They have—General Counsel's position is they haven't failed to return anybody to work. It's just when they—the failure came in where they put them when they brought them back, either in the job, shift, or classification."[1] Consistent with this representation made on the record, in discussing complaint paragraph 12(d) in his posthearing brief to the judge, counsel for the General Counsel specifically addressed only the issue whether the Respondent had unlawfully returned two unfair labor practice strikers to work that was different from their former prestrike jobs.

Based on the foregoing, it is apparent that the General Counsel expressly chose to proceed on a narrow theory of violation under complaint paragraph 12(d), specifically alleging only that, *when* the Respondent reinstated certain former unfair labor strikers, it unlawfully failed to return them to their former positions. His representations on the record reasonably led the Respondent to believe that it would not have to defend any delay in reinstating former unfair labor practice strikers. Nevertheless, the judge proceeded to find a violation of the Act on precisely this theory, thereby denying the Respondent due process. The unfair labor practice finding of delayed reinstatement cannot stand on the present record, and we conclude that the General Counsel is not entitled to a "second bite of the apple" through a remand that would effectively permit litigation of a theory he had disclaimed. See *Bouley*, 306 NLRB 385, 387 (1992) (the Board declines to remand for litigation of discharge on an 8(a)(4) theory of violation where the General Counsel chose to proceed solely on an 8(a)(3) theory). We there-

[1] Contrary to the Respondent, this statement by the General Counsel was a clarification, not an express stipulation. Contrary to the Charging Party Union, however, we find that this statement is significant in determining the merits of the Respondent's exception, because it is a representation by the General Counsel of what he is alleging to be unlawful.

fore reverse the judge and conclude that no violation can be found with respect to the Respondent's delay in reinstating the 89 former unfair labor practice strikers.

ORDER

IT IS ORDERED that the Respondent's withdrawal of its motion to reopen the record is granted, and the Board's prior Order severing and remanding to the judge for further proceedings the issue of the Respondent's alleged failure to timely reinstate 89 former unfair labor practice strikers is rescinded.

IT IS FURTHER ORDERED that the allegation that the Respondent unlawfully delayed the reinstatement of 89 former unfair labor practice strikers is dismissed.